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IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

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NO. 78-5420

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THEODORE PAYTON,

Appellant,

v.

NEW YORK.

---

ON APPEAL FROM THE NEW YORK
COURT OF APPEALS

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# JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the New York Court of Appeals rendered on July 11, 1978, affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed a judgment of the Supreme Court, New York County, convicting him of felony murder and sentencing him to 15 years to life imprisonment and submits this Statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

CITATION TO OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are officially reported at 45 N.Y.2d 300, and are annexed as Appendix A. The order of the Appellate Division, First Department is reported at 55 A.D.2d 859, and is annexed as Appendix B. The opinion of the Supreme Court, New York County, denying, in part, appellant's pretrial motion to suppress evidence is reported at 84 Misc.2d 973, and is annexed as Appendix C. The opinion of the Supreme Court, New York County, denying appellant's post-trial motion to set aside the verdict is not reported and is annexed as Appendix D.

## JURISDICTION

In affirming appellant's conviction, the New York Court of Appeals sustained the constitutionality of former sections 177 and 178 of the New York Code of Criminal Procedure which authorized warrantless arrests within a private dwelling. The judgment of the Court of Appeals was entered on July 11, 1978 and is annexed as Appendix E. A notice of appeal was filed in Supreme Court, New York County, the court possessed of the record, on September 12, 1978 and is annexed as Appendix F. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Court to review the judgment of the New York Court of Appeals. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3 (1963); Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282, 288-90 (1921).

## QUESTIONS PRESENTED

1. Whether former sections 177 and 178 of the New York Code of Criminal Procedure, authorizing a forcible police entry into a private dwelling for purposes of arrest without a warrant and without exigent circumstances, contravene the Fourth Amendment.

2. Whether admission into evidence, under the "inevitable discovery" doctrine, of a Firearm Transaction Record and the testimony of its custodian obtained by police as the direct result of a unlawful search was permissible under the Fourth Amendment.

3. Whether a preponderance of the evidence standard may constitutionally be utilized by a trial judge making a determination that evidence obtained in violation of the Fourth Amendment would nonetheless have been "inevitably discovered" by the police.*/

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV.

## STATUTORY PROVISIONS INVOLVED

FORMER NEW YORK CODE OF CRIMINAL PROCEDURE §§177 and 178 (66 McKinney's Laws, Ch. 4):

> §177. In what cases allowed.
>
> A peace officer may, without a warrant, arrest a person,

*/ With respect to questions 2 and 3, the Court's certiorari jurisdiction is also invoked pursuant to 28 U.S.C. §1257(3).

1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is being committed in his presence.

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

§178. May break open a door or window, if admittance refused.

To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

## STATEMENT OF THE CASE

On the morning of January 12, 1970, the manager of a service station in upper Manhattan was shot and killed in the course of a robbery. Two days later, on January 14, two witnesses, both of whom had known appellant, told the investigating officer, Detective Malfer, that appellant had committed the crime. Later that day, Malfer was taken to appellant's apartment building by one of the witnesses. However, the detective made no attempt to arrest appellant at that time, and he made no effort to obtain an arrest or search warrant.

The following morning at 7:30 a.m., Malfer returned to appellant's apartment, accompanied by a police sergeant and three other detectives. Although they saw a light shining beneath the door and heard a radio playing, there was no answer to their knock on the door. Unable to break through the apartment's metal door, they sought assistance from the Police Department's Emergency Services Division. An hour later, officers from that division arrived and, with crowbars, broke through the door.



Once inside the apartment, the police immediately learned that appellant was not there. Nonetheless, they conducted a thorough search of the apartment; the contents of drawers were dumped out, cupboards and closets were opened and examined and the officers looked beneath a mattress. The search uncovered a shotgun and some ammunition, several photographs, and a sales receipt for the purchase of a Winchester rifle. Detective Malfer also seized a .30 caliber shell casing which he observed on top of a stereo set. The following day, appellant surrendered himself and was subsequently indicted for felony murder and intentional murder.

At the conclusion of a pretrial suppression hearing, the court, on concession of the prosecution, suppressed all of the items taken from the apartment except the .30 caliber shell casing. The court held that the casing had been observed in "plain view" while the police, pursuant to sections 177 and 178 of the Code of Criminal Procedure, were lawfully in the premises to make a warrantless arrest for a felony which they had reasonable grounds to believe appellant had committed. (App. C., pp. 1, 2).

At trial, six witnesses to the crime testified. Each estimated the height and weight of the perpetrator and each agreed that all but the perpetrator's mouth and eyes were covered by a ski mask. Two of the witnesses, Melvin Gittens and Raymond Williams, stated they could identify appellant because of a prior acquaintance with him. Both Williams and Gittens had serious criminal records of their own */ and both had initially told the police they could not recognize the perpetrator. **/

*/ Gittens had actually been at the service station to meet his lawyer for the purpose of arranging his surrender on a homicide charge. While in the army, he had been convicted for sodomy for which he received a five year sentence and dishonorable discharge. Williams had four prior felony convictions, the most recent of which had been for attempted murder of a police officer. At the time of trial, Williams was serving a 10 year sentence and was due to see the Parole Board within a few months.

**/ Gittens testified that he "didn't feel like getting involved" until his lawyer mentioned that it was "too bad" he didn't know the perpetrators. Gittens stated he did, and his lawyer arranged a meeting with the district attorney at which he named appellant. Gittens was then allowed to plead guilty to first degree manslaughter, received a five year sentence from which he was paroled after 18 months, and was on parole at the time of the trial. Williams, who worked at the gas station, waited two weeks to tell anyone about appellant's involvement. And this occurred only when he was interrogated by Detective Malfer who indicated that an arrest had been made of a suspect whom the police knew to patronize a bar which Williams, himself, frequented.

Another prosecution witness, Jesse Leggett, testified that on the evening of January 12, he met appellant in a bar and appellant told him that he had held up a gas station. When he called appellant's attention to a news article about the crime in this case, appellant stated that it was the one to which he was referring. Leggett also stated that on the afternoon of January 13, appellant again entered the bar, carrying a gun case. While the case was never opened, Leggett asserted that it contained a 30/30 Winchester rifle, an assumption based on his previously having seen such a rifle when he and appellant had gone hunting together in various parts of New York State. Leggett further testified that appellant said he was going to dispose of the rifle and he, Leggett, advised appellant to give himself up. Leggett also had an extensive criminal record*/ and despite appellant's statements about the crime, made no effort to inform the police about them. It was only when, on January 14, Leggett himself had been picked up by the Nassau County police as a suspect in a unrelated robbery case that he came forward, during his own interrogation, with information about the gas station robbery.

The .30 caliber shell casing seized from appellant's apartment was place in evidence, as were two shell casings found on the floor of the service station and the prosecution's ballistics expert testified that all had been fired from the same gun. The prosecution also called Sidney Roseman, the owner of a sporting goods store in Peekskill, New York, the store which had issued the rifle sales receipt seized during the search of appellant's apartment but suppressed prior to trial. Roseman testified that on November 19, 1969, he had sold a 30/30 Winchester rifle and some ammunition to a man named Theodore Payton and had "thrown in" a black leather gun case. Roseman admitted, however, that he had little independent recollection of the sale, could not recall at all what the purchaser had looked like and testified that appellant did not look familiar to him. He admitted further that his ability to name appellant was derived solely from the Firearm Transaction Record he had filled out at the time of the purchase, the information for which he took from a driver's license provided by the purchaser of the rifle. This federally-required Firearm Transaction Record, which bore appellant's signature, was received in evidence. The defense objected to both Roseman's testimony and the Firearm Transaction Record as "tainted fruit" of the unlawful seizure of the suppressed sales receipt.*/

No witnesses were called by the defense and the jury found appellant guilty of felony murder but were unable to reach a verdict on intentional murder.**/ The defense moved promptly to set aside the verdict, claiming that the conviction had been based upon tainted evidence. The trial judge ordered a hearing, rejecting the prosecution's argument that even assuming inadmissibility, the Firearm Transaction Record and Roseman's testimony were only "a very small part of the People's case."

At the hearing, Leggett testified that he had made several hunting trips with appellant, that they would drive upstate on either Route 9 or Route 17, and that on one occasion he had been with appellant when appellant had purchased a shotgun at a store called "Tony's" in Ossining, New York. Leggett stated that he told Detective Malfer of this incident and also told him that appellant mentioned the purchase of a 30/30 Winchester in "upstate New York."

Malfer conceded that he had been led directly to Roseman by the illegally seized sales receipt. He stated that from Leggett he had learned only that appellant had purchased a shotgun at Tony's in Ossining and a 30/30 Winchester "somewhere upstate." Had he not found the sales receipt in appellant's apartment, Malfer asserted he would have obtained a list of gun dealers in the state and would have contacted "various stores on the list." He also stated he would have

*/At the time of appellant's trial, Leggett was facing attempted murder charges for shooting his mother-in-law. Following his testimony in this case, Leggett had an upcoming court date on that charge at which he was planning to enter a guilty plea for which he expected to receive a sentence of probation. He had previously been convicted for various assaults, theft, and gambling offenses.

*/ The prosecution also called a handwriting expert who testified that he had compared the buyer's signature on the Firearm Transaction Record with appellant's and concluded they were the same.

**/ The case was submitted to the jury at 2:45 p.m. on June 20, 1974 and the verdict was rendered at 6:10 p.m. the following day. The jury interrupted deliberations to request rereadings of various portions of the testimony of Leggett, Williams, Gittens and Gittens's lawyer and to request supplemental instructions on reasonable doubt and intentional murder.

driven upstated with Leggett in an attempt to find the store where the second purchase had been made.*/

Cross-examined, Malfer stated he "probably would have" contacted every gunshop in New York State. He admitted, however, that he had never personally conducted, nor had he ever heard of anyone else conducting, so extensive a search. He further maintained that he would have concentrated his efforts on the environs of the White Plains office of the Federal Bureau of Alcohol, Tobacco and Firearms. His reason: that the White Plains area "proved to be" the one in which he was interested. Lastly, the detective also claimed that he would have taken Leggett to Tony's in Ossining and that their next stop would have been Mr. Roseman's store on the northern side of Route 9.**/ Asked why he was sure he would have traveled north, rather than east, west or south, he answered only that it "made sense" to do so since Leggett had said that the rifle had been purchased "'upstate.'"

Detective Joseph Brady, who had also participated in the search of appellant's apartment, testified that had it been necessary, he too would have contacted all 1100 licensed gun dealers in New York State but he would have concentrated on the Catskill area because he recalled that Leggett had mentioned the Catskills as one of the places he had gone hunting with appellant.

The court denied appellant's motion to set aside the verdict, stating that, under what it deemed to be the appropriate standard of a preponderance of the evidence, "the evidence supports the People's claim that normal police investigative techniques would have uncovered the Peekskill gun dealer." The court added, however, "that if the test was either 'clear and convincing evidence' or 'beyond a reasonable doubt,' I would conclude that in this particular case the People did not meet either such standard." (App. D., p. 3).

On appeal to the Appellate Division, appellant challenged the constitutionality of the forcible, warrantless entry of his home and the statute under which it was authorized as well as the trial judge's ruling on inevitable discovery and the use of the preponderance standard to determine that issue. The Appellate Division unanimously affirmed appellant's conviction without opinion. (App. B.)

The same issues were raised before the Court of Appeals, which, by divided vote of 4-3, affirmed the order of the Appellate Division. With respect to the warrantless entry of appellant's apartment, on which the admissibility of the .30 caliber shell casing turned, the majority held that police entry of a home for the purpose of arrest, "if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances." (App. A., p. 1).

Noting that this Court had not yet resolved the issue, [App. A., pp. 5, 6], the majority reasoned that there "was a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for purpose of making an arrest," as well as a "significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." Thus, a warrantless entry for a search will be "both more extensive and more intensive," while entry for arrest will be achieved without "accompanying prying into the area of expected privacy attending [a person's] possessions and affairs." (App. A., p. 6).

The majority found support in "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests" and in "the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881, that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest," and that the "American Law Institute's

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*/ At trial, Malfer stated initially that he had contacted the Treasury Department in Washington for information about the weapon but, after admitting that his memo book contained no such indication, he stated that he could not recall making such a call. It was also clear from Roseman's trial testimony that there was no central registry from which Malfer could have obtained such information because Roseman was required by law to retain all Firearm Transaction Records.

**/ In its subsequent findings, the hearing judge found it was "not clear" whether Malfer had known prior to trial about the earlier purchase of the shotgun at Tony's. (App. D, p. 1).

Model Code of Pre-Arraignment Procedure makes similar provision..."*/ That "considered decisions in the federal courts have reached the opposite result" was noted. (App. A., pp. 7, 8).

The dissenters maintained that absent exigent circumstances, the police are constitutionally required to have a warrant to enter a home to arrest or seize a person. Writing on the warrant issue, Judge Cooke emphasized that "from the standpoint of the citizen--to whom the language of the Fourth Amendment is directed--it makes little difference whether the invasion of the privacy of his home was made to effect a warrantless arrest or a warrantless search." And while "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years, ...neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here." (App. A., pp. 17, 20).**/

On the issue of whether the testimony of the Peekskill gun store owner and the Firearm Transaction Record were tainted by the illegal search of appellant's apartment, the majority held that the "inevitable discovery" doctrine "does not call for certitude"; that what is required "is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source," and that "[t]he proof in this case meets that standard." (App. A., p. 9).

In dissent, Judge Wachtler labeled the evidence "a classic example of poisoned fruit" and argued that to apply the inevitable discovery doctrine "permits the court to ignore what really happened and to rely instead on hypothesis." (App. A., p. 12). He emphasized that the police could not have obtained a record of the sale from the Federal government; that they would therefore have had to check with a substantial number of gun dealers throughout the state which "would have involved such an effort that the police officers themselves admitted that they could not recall a single instance where an investigation of this nature and magnitude had been undertaken." (App. A. 12, 13). To arrive at such a result, Judge Wachtler maintained, the majority had diluted the standard of "'certitude'" established previously so that all the police need now show is "that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been." (App. A., p. 13). Judge Fuchsberg stated that the majority's departure from a standard of "true inevitability" required that the prosecution prove that "lawful discovery could have taken place beyond a reasonable doubt." (App. A., p. 15).

*/ Appellant's case drew into question the validity of sections 177 and 178 of New York's former Code of Criminal Procedure which was replaced on September 1, 1971 by sections 140.10, 140.15(4) and 140.25(1)-(3) of the Criminal Procedure Law. As the majority noted, "the substance of the provisions was continued and expanded" in the present statute. (App. A., p. 7, n.3). Thus, in the companion case of People v. Riddick, the majority applied the same analysis in sustaining the validity of those provisions of the Criminal Procedure Law. As we are also counsel to Mr. Riddick, a Jurisdictional Statement with respect to his case has been filed simultaneously with appellant Payton's Jurisdictional Statement. But due to the presence of other issues in Mr. Payton's case we thought it best, in the interests of clarity, not to consolidate the two cases into a single Jurisdictional Statement.

**/ Neither the majority nor Judges Cook and Fuchsberg shared Judge Wachtler's belief that exigent circumstances were present in this case.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### I.

This case presents the important question of whether, in the absence of any recognized exception to the warrant requirement of the Fourth Amendment, police officers may, to effect an arrest, forcibly enter a person's home without a warrant and in the absence of exigent circumstances. The issue is posed squarely in this case for, in seeking to arrest appellant, the police broke down the door to his apartment despite the absence of any exigency and without any attempt to obtain a warrant. The Court of Appeals held that New York's arrest statute, which authorized such conduct, was constitutional. The question merits full briefing and plenary review because of its intrinsic seriousness and because of the sharp split of authority among state and federal courts on its proper resolution.

While this Court has yet to decide the issue here presented the Court, in a number of cases in which its resolution was not required, has repeatedly recognized its substantial nature. United States v. Santana, 427 U.S. 38, 45 (1976)(Marshall, J. dissenting); United States v. Watson, 423 U.S. 411, 418, n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481

(1971); Jones v. United States, 357 U.S. 493, 499-500 (1958).

The issue is of great importance because it involves the two fundamental interests secured by the Fourth Amendment, privacy of the home and security of the person. In all other Fourth Amendment cases involving intrusions into the privacy of the home, this Court has held the intrusion strictly regulated by the warrant requirement. Nonetheless, the majority below held that entry into the home to seize a person is uniquely exempt from regulation by the warrant requirement. As the dissent points out, this interpretation of the Fourth Amendment thus affords greater protection to a person's property within his home, than it does to his person. This anomalous construction of the Fourth Amendment, and the vital interests which it implicates, justifies plenary review.

Review is also merited because of the conflict between the decision below and those of most courts, federal and state, which have considered this question. Most significantly, the decision conflicts squarely with the Second Circuit's recent decision in United States v. Reed, 572 F.2d 412 (2d Cir., 1978) which held, in no uncertain terms, that absent exigent circumstances, warrants are required for arrests within the home. Such disparate constructions of the Fourth Amendment by the highest appellate courts in the same jurisdiction have obvious undesirable consequences to the administration of justice and require resolution. See, Mincey v. Arizona, 98 S. Ct. 2408, 2419 (1978) (Marshall, J. concurring).[1/]

The decision below not only conflicts with that of the Second Circuit, it is also at odds with the result reached by all but one of the circuit courts of appeal which have ruled on the issue. Salvador v. United States, 505 F.2d 1348, 1351-52 (8th Cir., 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir., 1974); United States v. Shye, 492 F.2d 886, 891-93 (6th Cir., 1974); Dorman v. United States, 435 F.2d 385 (D.C. Cir., 1970); Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir., 1970); contra, United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir., 1970), cert. denied, 401 U.S. 966 (1971).[2/]

Among state courts, too, the larger number to have considered the question have taken the position that warrants are required for arrests in the home. See, State v. Cook, 115 Ariz. 188, 564 P.2d 877 (1977); People v. Ramey, 16 Cal.3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (In Banc), cert. denied, 429 U.S. 929 (1976); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); Laasch v. State, ___ Wis. ___, 23 Cr. L. Rep. 2404 (Aug. 9, 1978); but see, State v. Perez, 277 So.2d 778 (Fla.), cert. denied, 414 U.S. 1064 (1973); People v. Eddington, 23 Mich. App. 210, 173 N.W.2d 686 (1970), aff'd, 387 Mich. 551, 198 N.W.2d 297 (1972). Of course, a large number of states, like New York, have statutes which authorize warrantless arrests in the home. See ALI Model Code of Pre-Arraignment Procedure, Appendix XI at 696 (1975). Although New York had upheld the validity of its statutes in this case, the constitutionality of those statutes and the similar ones in other states remains in doubt due to the substantial body of case law to the contrary. Accordingly, the question of validity of the New York statutes which authorize warrantless arrests in the home is of substantial constitutional dimension and should be granted plenary review.

II.

The application of the inevitable discovery doctrine by the majority below to sustain the admissibility of the Firearm Transaction Record and the testimony of its custodian, Mr. Roseman, the Peekskill gun store owner, presents a substantial constitutional question meriting review. This Court had never ruled explicitly upon the validity of the inevitable discovery doctrine as a constitutionally permissible basis for the admission of evidence obtained as the direct result of an unlawful search. See, Note: The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 Colum. L. Rev. 88, 90-91 (1974). Several members of the Court, however, have acknowledged the seriousness of the issue, expressing concern both as to whether the independent source exception "encompasses a hypothetical as well as an

1/ The question will undoubtedly arise as to the admissibility of evidence obtained unlawfully under Reed by federal officers which is turned over to state law enforcement officials for use in prosecutions under state law. Since New York recognizes no unlawfulness in such circumstances, there may indeed be a recurrence of the "silver platter" doctrine. See Elkins v. United States, 364 U.S. 206 (1960).

2/ District courts in at least two circuits where the question remains open have also held that warrants are required. United States v. Weinberg, 345 F. Supp. 824, 837-838 (E.D. Pa. 1972), aff'd in pt., 478 F.2d 1381 (3d Cir., 1973), cert den. 414 U.S. 1005; Huotari v. [illegible], 380 F. Supp. 645, 649-51 (D. Minn., 1974).

actual independent source," [Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973)(White, J. and Douglas, J. dissenting from the denial of certiorari)], and in a related context, with the consequences to the exclusionary rule of a standard which makes "the exclusion decision turn not on what events transpired but on what might have transpired." Jarvis v. United States, 55 L.Ed. 2d 532, 533 (1978)(White, J. and Brennan, J. dissenting from the denial of certiorari).

What compels review of the inevitable discovery issue in this case is the degree to which the New York Court of Appeals has itself departed from the standard of certainty upon which it had insisted in Fitzpatrick.[3/] As Judge Wachtler emphasized in dissent below, discovery of the Firearm Transaction Record was not based "on the type of inevitability which was contemplated in Fitzpatrick (supra, at p. 507) where the Court repeatedly noted that discovery of the evidence was 'certain' and the police had only to look in the next most reasonable place." (App. A., p. 13). Rather, by now requiring only "'a very high degree of probability,'" the court had made it possible for the police in any case, with the benefit of hindsight, to "show that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical and no matter how involved or extraordinary resort to the procedure would have been." (Ibid.)

In order to "untaint" the fruit of the egregiously unlawful police conduct in this case, the majority relied on a process of hypothesizing an independent source based, not upon certainty, but upon probability. The record in this case underscores vividly the inherent danger of such an approach and the hindsight upon which it is premised.

3/ There are, of course, important factual distinctions between this case and Fitzpatrick which, assuming arguendo the general validity of the inevitable discovery doctrine, may be of relevance to a determination as to the appropriateness of its application in a given case. In Fitzpatrick, the failure to afford the defendant Miranda warnings resulted in a statement directing the police to a closet in which the murder weapon and ammunition were hidden. In this case, the police conducted an extensive, unlawful search of appellant's home. Without placing greater value upon rights under the Fourth Amendment, the unlawful conduct of the police in this case was far more severe, and thus arguably more demanding of exclusionary rule application, than the police conduct in Fitzpatrick. See, United States v. Ceccolini, 55 L.Ed. 2d 268, 279 (1978).



At first, the prosecution contended that information about appellant's purchase of a rifle was readily available from a central federal registry. Detective Malfer quickly volunteered that he had, in fact, contacted that agency. However, Malfer retreated from that statement when his own memo book established that he had made no contact with any agency. Moreover, Roseman's testimony established that records of gun sales were never sent to any central agency. A new hypothesis was then proferred; that the police, knowledgeable about the purchase of a shotgun in Ossining, "inevitably" would have proceeded to Peekskill, where Roseman's store was located, because to Malfer it "made sense" to go north. This hypothesis dissipated when the trial court refused to credit the testimony of Malfer and Leggett that information about the Ossining shotgun purchase was known to the police before trial. (App. D., p. 1). Although the majority refers to Malfer's testimony on this point, the decision appears to turn on the broadest hypothesis tendered: that it was normal police procedure to obtain from the Treasury Department a list of all gun shops and then to communicate with all such shops in an effort to locate the weapon sought, and therefore that such effort would have included contact with the Peekskill store. (App. A., pp. 9, 10). To accept such conjecture, in a case where the police witnesses themselves admitted they had never heard of an investigation of such magnitude conducted in similar circumstances, seriously undermines Fourth Amendment safeguards.

As this Court has emphasized frequently, the primary rationale for the exclusionary rule is deterrence of official misconduct. See, United States v. Calandra, 414 U.S. 338, 347-48 (1974). Underlying the "fruit of the poisonous tree doctrine" is the concomitant principle that the State should not reap the benefit of unlawful police conduct. Wong Sun v. United States, 371 U.S. 471, 484, 485 (1963). The result below disserves these principles. For, in this case, the conduct of the police which led directly to their location of the Firearm Transaction Record was paradigmatically unlawful--the precise type of behavior to which the message of the exclusionary rule is, in a classic sense, addressed.

Having broken down the door to appellant's home, ostensibly to gain entry for the purpose of arrest, the police immediately learned that he was not there. Undaunted, they proceeded to search his apart-

ment extensively by looking under a mattress, opening closets, and rummaging through drawers and cupboards. The unlawfulness of this conduct was quickly conceded by the prosecution prior to trial, and the police readily admitted that the location of the Firearm Transaction Record was the direct result of the search.

The tension between the rationale of the exclusionary rule and the yet to be approved "inevitable discovery" exception to the rule is thus squarely presented in this case.[4/] On one hand, there is unlawful police conduct of the most serious kind to which the principle of deterrence must be addressed. On the other, is the utilization of a process of hypothisation which, in the words of Judge Wachtler, "can only serve to erode the exclusionary rule." (App. A., p. 13).[5/] The question warrants plenary review.

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4/ The conflict between the New York Court of Appeals and the Second Circuit [United States v. Paroutian, 299 F.2d 486 (2d Cir., 1962)] on this question, referred to by Mr. Justice White in his dissent from the denial of certiorari in Fitzpatrick, 414 U.S. at 1051, has also not abated.

5/ Our discussion, like that of the court below, has been concerned with the admission of the Firearm Transaction Record and the independent source analysis upon which it is based. The prosecution argued below, however, that as to the admissibility of the live testimony of Mr. Roseman, an attenuation analysis was also appropriate. The majority, in a footnote, stated only that "[a]s to the possible alternative ground for reaching this conclusion, namely that the testimony of the keeper of the gun shop was admissible under the attenuation rule with respect to the testimony of live witnesses, see People v. Mendez, (28 N.Y.2d 94) (compare also United States v. Ceccolini, ___U.S.___, 46 USLW 4229)." (App. A., p. 10, n.6). The reason for such minimal concern with Roseman's testimony itself is that without the Firearm Transaction Record, he had little independent recollection of the sale to appellant of the Winchester He did not remember what the purchaser looked like and admitted that appellant did not look familiar to him. Moreover, his ability to name appellant as the buyer was derived exclusively from the Firearm Transaction Record itself. Thus, without that record, Roseman's testimony would have been of little help to the prosecution's case.

We would only note that to apply an attenuation principle to Roseman's testimony would be unwarranted by Ceccolini and inconsistent with the Court's rejection of a per se rule in that case. First, Roseman's identity, unlike the witness Hennessey in Ceccolini, was entirely unknown to the police until their search of appellant's apartment uncovered the sales receipt. Second, the Firearm Transaction Record was used to examine Roseman at trial whereas the policy slips in Ceccolini were not used to question Hennessey. Third, and most critical, unlike Officer Biro's unintentional discovery of the policy slips in Ceccolini, the police in this case conducted an extensive and unlawful search with the specific intent of obtaining evidence.

In Ceccolini, the Court determined that each case must be examined to balance the benefits of the exclusionary rule, with its deterrent purpose, against the costs. 55 L.Ed. at 268. Excluding the fruit of the patently unlawful search in this case, albeit in the form of a live witness, "cannot be dismissed as of "negligible deterrent effect." 55 L.Ed. 2d at 279. See, United States v. Scios, ___F.2d___, D.C. Cir. en banc, July 21, 1978, [illegible] to the extent that the footnote in the majority opinion below suggests an

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III.

The record in this case also presents the important question of whether a mere preponderance standard is constitutionally permissible for a determination that, based on a purely hypothetical set of circumstances, illegally obtained evidence would nonetheless have been discovered by the police.

In this case, the hearing judge found specifically that had he been required to adhere to either a "reasonable doubt" or "clear and convincing evidence" standard, the prosecution would not have sustained its burden of proving that by following normal police procedures, the Firearm Transaction Record in Mr. Roseman's possession would have been discovered. (App. D., p. 3). While the majority did not specifically address the issue, such a finding of fact by the trial court remains unaltered because the Court of Appeals, as noted elsewhere in the majority opinion, lacks jurisdiction to redetermine questions of fact based on credibility or on the weight of the evidence. (App. A., pp. 8, 9). See, also, Cohen and Karger, POWERS OF THE NEW YORK COURT OF APPEALS 447-52 (1952). Thus, in this case, the question of burden of proof was crucial.

The question of the specific nature of the burden of proof in inevitable discovery cases has not received extensive treatment by the lower courts and is, of course, ancillary to the primary question of whether the "inevitable discovery" doctrine is a valid exception to the exclusionary rule. (See pp. 12-15 ante). However, the Third Circ has expressed the view that a clear and convincing evidence standard is the appropriate one. Government of Virgin Islands v. Gereau, 502 F.2d 914, 927 (3rd Cir., 1974). And it is our submission that, at the very least, in order to secure the policies underlying the Fourth Amendment and because the "inevitable discovery" doctrine most closely parallels the independent source concept in the identification area, a burden of "clear and convincing evidence" is a minimum constitutional requirement. United States v. Wade, 388 U.S. 218, 240 (1968).

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(fn. cont'd.)
alternative ground for the admissibility of Roseman's testimony, its extension of the attenuation doctrine to the facts of this case would also warrant review as a subsidiary issue.

Such conclusion is warranted because inevitable discovery is but one aspect of the broader category of "independent source." Indeed, it assumes a purely hypothetical, rather than an actual, independent basis for the admissibility of otherwise tainted evidence. Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973)(White, J. dissenting from the denial of certiorari). Thus, independent source cases, such as Wade, which require that the prosecution prove by "clear and convincing" evidence that there is an untainted basis for the challenged evidence, point strongly to that requirement where inevitable discovery is at issue.

With independent source analysis, the prosecution asserts that the challenged evidence was, in fact, developed through entirely lawful means, without exploitation of the principal illegality. See, Lawn v. United States, 355 U.S. 339 (1957). With inevitable discovery, the prosecution concedes exploitation but asserts that it would have taken such steps as would have led inevitably to discovery of the evidence in question: a purely hypothetical source. Thus, in this case, by a mere preponderence of the evidence, the hypothesis was accepted that a lawful investigation would have been undertaken and that it would have turned up the Firearm Transaction Record. Yet logic would seem to compel the conclusion that if the prosecution must prove by "clear and convincing evidence" an actual independent source [United States v. Wade, supra, 388 U.S. at 240], a fortiori, it should be required to do so when a hypothetical source is the object of its proof.[6/]

6/ Although the People, in their brief below, cited federal decisions which suggest a preponderance burden where independent source is involved, those cases dealt with issues very different from the inevitable discovery theory involved here. See, United States v. Ceccolini, 542 F.2d 136, 141-42 (2d Cir., 1976), rev'd on other grounds, 55 L.Ed. 2d 268 (1978); United States v. Cales, 493 F.2d 1215 (9th Cir., 1974); United States v. Falley, 489 F.2d 33, 40-41 (2d Cir., 1973); United States v. Cole, 463 F.2d 163, 172-174 (2d Cir., 1972). See also, Lego v. Twomey, 404 U.S. 477, 487, n.15 (1972). In these cases, the issue was one of actual taint; specifically, whether the antecedent illegality did in fact cause government agents to undertake the investigation which led to the challenged evidence, or whether information already in their possession through legal means had in fact provided the impetus for launching the investigation. Here, by contrast, actual taint is conceded, i.e., the People admit that the illegally found slip was what led the police to direct their inquiry to Mr. Roseman, but contend that even without reading Roseman's name on the sales slip, the police would have obtained the legally available information about gun dealers in the state which in turn would have led them to investigate the Peekskill store owner. Thus, while the above-cited cases require

(fn. cont'd.)

The policy of deterrence, which lies at the heart of the exclusionary rule, would seem to demand a far more stringent standard of proof than that applied by the trial court and affirmed implicitly by the majority in this case. A preponderance standard requires no more than that on the evidence adduced, the existence of facts at issue is more likely than their non-existence. As this case demonstrates, the prosecution will almost always be able to meet so low a burden by simply hypothesizing a number of steps leading to the source of the evidence which, with the benefit of hindsight, will appear logical "to a high degree of probability." Given the potential of the result reached by the court below for eradication of any serious meaning from the exclusionary rule, the burden of proof upon which the inevitable discovery doctrine is premised should be more demanding than a mere preponderance.

## CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted,

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September 18, 1978

THE OPINIONS ATTACHED AS APPENDICES ARE PRINTED IN MORE LEGIBLE FORM IN THE APPENDIX VOLUME AND HAVE NOT BEEN REPRODUCED HERE.

(fn. cont'd.)
the absence of actual taint to be proved by only a preponderance, they cannot be read as authority for the proposition that the far more speculative claim made herein should be tested against a similarly undemanding standard of proof. Indeed, the Second Circuit, from which all but one of the above-cited cases originated, would not even entertain so hypothetical a claim, regardless of how much proof the prosecution was prepared to offer; that Court follows a per se rule that where, as here, the challenged evidence was in fact discovered by exploiting the primary illegality, the evidence must be suppressed without further inquiry. United States v. Cole, supra, 463 F.2d at 174; United States v. Paroutian, supra, 299 F.2d at 489.